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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICK PESSLER, Plaintiff and Appellant, v. GREG METCALF as Trustee etc., et al., Defendants and Appellants.	G036418 (Super. Ct. No. 04CC02818) O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed in part and reversed in part.

Stanley D. Bowman for Plaintiff and Appellant.

Green & Hall, Robert L. Green and Matthew S. Buttacavoli for Defendants and Appellants.

* * *

Plaintiff Rick Pessler sued defendant Greg Metcalf, trustee of the Cynthia Court Trust #2331 (seller), seeking specific performance of a real estate purchase contract. His complaint also sought damages for fraud against seller, plus defendants Peggy Henrichsen and Cornerstone Properties. After a nonjury trial, the court denied specific performance, but awarded plaintiff nearly $47,000 in damages against seller for his repairs to the property before the seller removed him from the premises.

Both parties appeal. Plaintiff attacks the court's denial of specific performance, claiming seller's failure to complete termite repair work precluded him from acquiring the financing essential to complete his purchase of the property. He also contends the court erred by not awarding him damages for additional repair expenses allegedly caused by defendants' failure to disclose the absence of building permits. In their appeal, defendants argue the court erred by failing to expressly enter judgment in their favor on the fraud claim and by awarding plaintiff quantum meruit relief.

We conclude plaintiff's claims lack merit and affirm that portion of the judgment denying specific performance of the purchase agreement. We agree with defendants' claims and direct the judgment be amended to declare plaintiff take nothing on his fraud cause of action, and to reverse that portion of the judgment awarding plaintiff quantum meruit relief.

FACTS

In March 2003, seller purchased a single family residence in Costa Mesa at a foreclosure sale. He retained Henrichsen, a real estate broker with Cornerstone to assist in making repairs to the property and reselling it.

On July 31, Cornerstone listed the property for sale. The listing noted "house is currently being redone," and the $509,000 asking price was for the property "'as is.'" Shortly thereafter, Cornerstone's employees pulled building, plumbing, and

electrical permits and began repair work on the premises. In addition, because a prior owner had built a room addition without obtaining the necessary permits, Cornerstone asked city inspectors to visit the property and advise it of what work needed to be done to bring the residence into code compliance.

An extermination company conducted a termite inspection for defendants. The exterminator's inspection report declared it covered "only the visible and accessible areas of the structure." In early August, the exterminator fumigated the residence and prepared a notice of the work it completed which "certif[ied] this structure is now free of any evidence of active infestation in the visible and accessible areas . . . ." The notice cited five items listed in the prior inspection report that had not been completed. Three of the uncompleted tasks were described as "Section 1 Item[s:]" (1) the living room window frame; (2) living room hardwood floor; and (3) the exterior trim. The two remaining tasks, both involving the home's foundation, were described as "Section 2 Item[s]."

Plaintiff, who claimed to have experience in making home repairs, along with his real estate broker, Yvette Prell, visited the residence. Both plaintiff and Prell testified that they observed termite damage. Plaintiff also admitted he had previously noticed the property "tent[ed] . . . for termite work . . . ." Prell testified it was "obvious" the home was larger than the square footage mentioned in the listing's property profile. She "mentioned" to plaintiff there was an addition to the residence, "probably not permitted," and that the lack of a permit "may become an issue with the appraiser."

On August 8, plaintiff submitted an offer to buy the property, using a preprinted standard residential purchase agreement. The offer identified the buyer as "R. Pessler and/or assignees." It required seller to pay for a termite inspection report and "all Section 1 termite work." Paragraph 7 of the offer declared "the [p]roperty is sold . . . in its present physical condition," and "advised" the buyer "to . . . investigat[e] . . . the entire Property in order to determine its present condition . . . ." (Bold and capitalization

omitted.) This paragraph also required the seller to timely "disclose known material facts and defects affecting the property," and gave the buyer the right to either "cancel this Agreement[] or . . . request that [the seller] make Repairs or take other action" after "inspect[ing] the Property." (Bold and some capitalization omitted.) Through a series of several counteroffers that "accepted" the bulk of the original offer's "terms and conditions," the parties ultimately agreed plaintiff would buy the property for $475,000, making a $1,000 down payment and obtaining a loan for the balance of the purchase price.

The parties also orally agreed plaintiff could enter the property before escrow closed to "finish the [property] rehab[ilitation] that was started" by seller. Henrichsen denied that this agreement included a promise seller would reimburse plaintiff for the expenses incurred by him in making the home repairs. In a note to Henrichsen, Prell stated, "If [plaintiff] ends up not obtaining his financing, then I suppose you . . . get a house in a repaired condition."

Prell obtained several extensions of the purchase agreement's original 45-day escrow. In an October 29 letter, she noted plaintiff had encountered "setbacks" because of "unexpected electrical . . . and plumbing problems," and that "the appraisal ha[d] been kicked back due to the fact that we did not have [the] carpet or kitchen completed."

In early December, seller issued a notice demanding plaintiff complete the purchase. Prell responded, citing the lack of a permit for the room addition, plus "ongoing problems with the termite situation" she claimed resulted from the exterminator's failure to fully perform the fumigation work. In response to seller's subsequent effort to cancel the escrow, Prell insisted plaintiff would be able to close escrow within a short time. Twice she sought to amend the agreement, first seeking over $3,500 for plaintiff's completion of the termite work, and later demanding $50,000 for his repairs to the property.

Eventually, defendants removed plaintiff from the property and relisted it for sale. Plaintiff testified that between mid-August 2003 and April 2004, he either made or paid for repairs to the property costing him over $81,000.

Plaintiff did not apply for a home loan to finance the purchase until April 2004. Rather, in September 2003, his father, also named Richard Pessler, applied with Home Loan Funding seeking two loans to be secured by first and second trust deeds. Plaintiff admitted he never assigned the purchase agreement to his father.

In late December, Home Loan Funding issued a "preapproval subject to conditions" on the father's applications. Patricia Benjamin, an employee for the lender, testified the conditions were not satisfied and the approval expired on January 30, 2004. One of the unsatisfied conditions, completion of the property appraisal, resulted from unfinished improvements, including "carpeting wasn't in, wires were exposed in the wall, [and the] stove was removed from the property." Benjamin also noted the father's application inconsistently listed his current residence as an asset worth $475,000 while acknowledging he was renting the premises. She denied the lack of building permits or the absence of a termite clearance were conditions for loan approval.

In April and May 2004, plaintiff unsuccessfully applied to Home Loan Funding and a second lender for loans to complete the purchase. Benjamin testified plaintiff "did not qualify for [this] loan program," in part due to his low credit score and prior bankruptcy.

PROCEDURAL BACKGROUND

Plaintiff sued defendants in February 2004. The first count sought damages for fraud. It alleged defendants "entered the . . . property" to perform "interior construction" and discovered "the termite problem." Defendants nonetheless "assured [p]laintiff that the property was in good condition" and, after entering into the purchase

agreement, delivered a supplemental property disclosure statement advising "'the buyer . . . to conduct [his] own "due diligence"'" because "'[s]eller has no history with this unit,'" had "'not occup[ied] the residence, and . . . [had] owned it for less than four months.'" Plaintiff claimed that since defendants knew about "the termite . . . damage," these representations were false and, "[h]ad [he] been aware of [their] falsity[,] he would not have entered into the contract."

In a separate count, plaintiff sought specific performance of the purchase agreement. Plaintiff alleged, in part, he "has performed all conditions precedent" he agreed to perform," "has offered to pay the full consideration called for in the agreement," and "continues to be ready, willing, and able to pay the consideration . . . ."

After trial, the court issued a minute order summarizing its findings. It held that plaintiff "breached the contract of sale by not completing the transaction within the time allotted . . . including the numerous extensions[]" due to his failure "to obtain financing." But, finding "many . . . repairs done by . . . [p]laintiff . . . were beneficial to . . . [s]eller," the court awarded him "quantum meruit reimbursement . . . in the amount of $46,707.23."

Defendants filed two postjudgment motions. First, they sought an express ruling "there was no fraudulent misrepresentation or concealment which plaintiff relied upon to his damage[]." Second, defendants moved to vacate the quantum meruit award, citing the absence of a request for this relief in either the complaint or the parties' pretrial joint statement of controverted issues, and the fact plaintiff introduced evidence of the improvements solely to support his fraud cause of action.

The record does not contain a ruling on defendants' first motion, nor does the judgment mention the fraud count. In a minute order the court denied the second motion finding "[t]he parties offered sufficient evidence and opposing arguments to apprise the [c]ourt . . . of the basis for the compensation requested by [p]laintiff" and

determined the amount from "the stipulated exhibits offered in . . . [p]laintiff's 'Receipt Notebook.'"

DISCUSSION

1. Specific Performance

Plaintiff argues "the termite work was an essential requirement to [his] obtaining financing to complete the purchase," and the trial court erred in denying specific performance because seller's "failure to complete" the work cited in the termite inspection report "prevented, or at the very least delayed" his performance under the contract. Defendants dispute this argument on several grounds. We conclude both the record and the law support the ruling.

"[F]or a buyer of real estate to obtain specific performance, the buyer must prove 'that he was ready, willing and able to perform at the time the contract was entered into,'" [and] "'that he continued ready, willing and able to perform at the time suit was filed and during the prosecution of the specific performance action.' [Citation.]" (*Behniwal v. Mix* (2005) 133 Cal.App.4th 1027, 1044; see also *Cockrill v. Boas* (1931) 213 Cal. 490, 492 ["an essential basis for the equitable remedy must be a showing by the plaintiff of performance, or tender of performance, or ability and willingness to perform"].) This rule applies "[w]here the action is based on the seller's anticipatory breach" because "even if seller is guilty of a breach of contract, in order to obtain specific performance, buyers must prove they had the ability to pay the purchase price within a reasonable time." (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 669-670.)

The question of whether a buyer had the financial ability to perform under the purchase agreement presents a question of fact. (*Henry v. Sharma, supra*, 154 Cal.App.3d at p. 670.) "'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court

begins and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' . . .*" (*Ibid.*)

The evidence established that while plaintiff promised to obtain financing to complete his purchase of the property, he personally did not apply for a loan until April 2004, long after the final escrow extension terminated, seller demanded cancellation of the purchase agreement, and plaintiff had filed this lawsuit. Even then, his loan applications were rejected because he failed to qualify. While plaintiff's father timely applied for financing, plaintiff never assigned the purchase agreement to him and the father's conditional approval expired before plaintiff filed suit.

Plaintiff argues the termite work seller agreed to perform "had to be completed before [he] could qualify for a home loan . . ., making [seller's] promise a condition precedent to [his] obtaining the financing." First, the facts of this case do not support plaintiff's assertion that the termite repair work was a condition of loan approval. Henrichsen testified she had participated in over 50 property sale transactions where a lender did not require a termite completion report before approving a purchase loan. Benjamin, the lender's representative, also testified proof the property was free of termites was not a condition for father's final loan approval.

Second, plaintiff's argument is contrary to the law. "The rule is that provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. [Citations.] Instead, whenever possible the courts will construe promises in a bilateral contract as mutually dependent and concurrent. [Citations.]" (*Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53-54; see also *Katemis v.*

Westerlind (1953) 120 Cal.App.2d 537, 546.) "There are . . . numerous cases holding or indicating that in respect to an escrow to effectuate a purchase and sale of real property the duty of the seller to deposit necessary instruments and the duty of the buyer to deposit the necessary funds are concurrently conditional. [Citations.]" (*Fogarty v. Saathoff* (1982) 128 Cal.App.3d 780, 785.) "As applied to a contract for the sale of real estate calling for concurrent performance, neither party can place the other in default unless he is fully able to perform or make a tender of the promised performance. [Citation.]" (*Rubin v. Fuchs, supra,* 1 Cal.3d at p. 54; see also *Katemis v. Westerlind, supra,* 120 Cal.App.2d at p. 546.)

Plaintiff's original offer contained a clause declaring the agreement would be "subject to" certain reports, including the "termite report." The phrase "'Subject to' is generally construed to impose a condition precedent. [Citations.]" (*Rubin v. Fuchs, supra,* 1 Cal.3d at p. 54.) Since seller's counteroffers never sought to amend or delete this clause, it presumably was part of the parties' final contract.

But defendants provided plaintiff with the termite report as well as the exterminator's repair completion report shortly after the parties entered into the purchase agreement. While the contract also required seller to "pay for the . . . termite repairs," this obligation is not phrased in a manner indicating the repairs were to be completed before plaintiff's obligation to tender his performance would arise. This conclusion is buttressed by the original offer's additional clause stating "the property is sold . . . in its present physical condition . . . ." (Bold and capitalization omitted.)

Even assuming the agreement could be construed to make seller's termite repair obligation a condition precedent to plaintiff's performance, the evidence further establishes he waived the condition by assuming possession of the property and making extensive changes, including completion of the unfinished termite work. "A condition may be *waived*; i.e., the party whose duty is *dependent* upon the other party's performance of a condition may make his or her duty *independent*, binding the party to

perform unconditionally. [Citations.]" (1 Witkin, Summary of Cal. Law. (10th ed. 2005) Contracts, § 823, p. 912.) By accepting responsibility for completing the termite repair work, plaintiff eliminated the purported condition precedent to his obligation to tender the purchase price. As noted, he failed to perform his end of the bargain.

The trial court properly found plaintiff breached the contract by failing to timely obtain financing to complete his purchase of the property.

2. The Fraud Cause of Action

Although plaintiff alleged a cause of action for fraud against defendants and they sought an express ruling on this count, the trial court never explicitly did so. Both parties appeal.

Plaintiff contends the court erred in failing to award him fraud damages in the form of "the costs of obtaining the necessary permits and reimbursement for his effort in obtaining" them, arguing seller "had a duty to inform [him] of the fact that the property was missing certain permits and was in violation of others, and by not informing him, . . . breached this duty." Defendants contend plaintiff cannot assert this claim because the complaint's fraud cause of action alleged only misrepresentations about termite damage, not nondisclosure concerning building permits. They also argue the evidence supports findings plaintiff did not justifiably rely on alleged misrepresentations or nondisclosure concerning either termite damage or building permits. On their own appeal, defendants argue the trial court erred in failing to enter a judgment in their favor on the fraud claim.

Defendants' contentions have merit. First, plaintiff's complaint sought damages for fraud based on defendants' alleged misrepresentations concerning the property's condition and nondisclosure as to the extent of the termite damage. The first mention of the alleged nondisclosure concerning permits as a basis for relief was at trial.

Second, the evidence unambiguously established plaintiff knew about both the termite damage and potential permit issues before he offered to buy the property and

thus cannot establish justifiable reliance on any alleged misrepresentations or nondisclosures by defendants. "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. [Citations.] 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' [Citations.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239; see also *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498-1499.)

Plaintiff claimed to have experience in making property repairs, testifying he had previously "owned and rented . . . units" and made "cosmetic upgrades" that included "twelve bathrooms and six kitchen remodels" and "recarpet[ing] . . . ." Before making the initial offer, plaintiff visited the property twice. He admitted that during one "walk-through," he "saw . . . a lot of termite problems . . . ." Prell also testified that during a visit to the property, it was "apparent" that termite work needed to be done. In its posttrial minute order, the trial court expressly found plaintiff "knew when he negotiated for the purchase of the property that [it] had experienced severe termite damage."

As for permits, Prell testified she was immediately aware of potential permit issues because the house was "obvious[ly]" larger than what was shown on the listing's property profile. She "indicated [to plaintiff] . . . that the square footage did not match what we were looking at and that the additions were probably not permitted and the seller probably bought it in that condition." Although plaintiff claimed on direct examination that he did not "absolutely" become aware permits had not yet been obtained until early December 2003, defendants introduced his deposition testimony where he admitted "asking questions about the permits" in August 2003 and that Prell contacted

the city about this matter in October. Prell also admitted one "can buy property even though there are outstanding permit problems," and that "lenders will lend even though permits are outstanding."

Finally, not only was plaintiff allowed to inspect the property before offering to buy it, seller agreed he could take possession of the premises before escrow closed to make the necessary repairs. "[T]he right to rely upon the [seller's] representations, of course, does not exist where a purchaser chooses to inspect the property before purchase, and, in making such inspection, learns the true facts, for the obvious reason that he has not been defrauded unless he has been misled, and he has not been misled where he has acted with actual or imputed knowledge of the true facts. [Citations.] [¶] Upon the question of knowledge it is held, generally, that where one undertakes to investigate the property involved or the truth of the representations concerning it and proceeds with the investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned . . . . 'The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.' [Citation.]" (*Carpenter v. Hamilton* (1936) 18 Cal.App.2d 69, 71; see also *Kramer v. Musser* (1943) 57 Cal.App.2d 942, 946.)

Thus, the evidence supports a finding that plaintiff knew about the property's defects well within the time allowed under the contract for him to either demand seller make repairs or cancel the agreement. Plaintiff claimed he did request seller take action, but defendants denied that occurred and the evidence supports the trial court's implied ruling in their favor. Since, under the circumstances of this case, "'the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied a recovery.' [Citations.]" (*Alliance Mortgage Co. v. Rothwell, supra*, 10 Cal.4th at p. 1240.)

Defendants contend the judgment is erroneous because it fails to expressly rule on plaintiff's fraud cause of action. "It is the general rule that a judgment must be sufficiently certain to permit enforcement." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 185; see also 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 42, p. 574.) Where possible, a judgment must be construed to uphold it. (*California School Employees Assn. v. King City Union Elementary School Dist.* (1981) 116 Cal.App.3d 695, 702; 7 Witkin, *supra,* Judgment, § 43, at p. 574.) "Where an ambiguity exists, 'The rule with respect to orders and judgments is that the entire record may be examined to determine their scope and effect . . . .' [Citation.]" (*Estate of Careaga* (1964) 61 Cal.2d 471, 475-476.)

The complaint alleged defendants misrepresented the condition of the property and failed to disclose the termite damage, but the trial court expressly found plaintiff knew about the extent of the termite problems before offering to buy the property and also received permission to enter the premises and make repairs before escrow closed. Thus, it can be assumed from the ruling against plaintiff on the specific performance claim and the court's reference to the monetary relief award as "contract" damages, it ruled against plaintiff's fraud claim. The judgment must be amended to include a provision ruling in favor of defendants on this cause of action.

3. Quantum Meruit Relief

Finally, defendants contend the court also erred in awarding plaintiff nearly $47,000 for repairs that he made to the property before they evicted him from the premises. The posttrial minute order described the recovery as a "quantum meruit reimbursement." But the judgment awarded plaintiff recovery of this sum "for breach of contract." The trial court's award is erroneous regardless of whether it is based on a breach of contract or quantum meruit theory.

When a plaintiff sues for specific performance of a real property purchase agreement, if the court determines the plaintiff is not entitled to that relief, it may award damages in lieu of specific relief. (*Pascoe v. Morrison* (1933) 219 Cal. 54, 58; *Brandolino v. Lindsay* (1969) 269 Cal.App.2d 319, 324.) In addition, even where the court issues a decree of specific performance, it may also award monetary compensation to the plaintiff resulting from the defendant's delay in conveying the property. (*Bravo v. Buelow* (1985) 168 Cal.App.3d 208, 213; *Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 332-333.)

But a plaintiff's right to damages arises only where the cause of action is established. (*Paratore v. Perry* (1966) 239 Cal.App.2d 384, 388; *Baran v. Goldberg* (1948) 86 Cal.App.2d 506, 511; *Eagle Oil & Refining Co. v. James* (1942) 52 Cal.App.2d 669, 678.) Here, the court expressly found plaintiff was not entitled to specific performance because he breached the purchase agreement by failing to obtain the necessary financing. Since the court denied specific performance on the ground plaintiff breached the agreement, an award of damages for breach of contract cannot stand.

The court's posttrial minute order reflects it believed plaintiff "should be compensated for the beneficial work he performed on the property." Defendants attack the quantum meruit recovery on several grounds. For one thing, plaintiff never alleged a cause of action seeking this relief. Nor was the issue mentioned in the parties' joint statement of the issues.

Furthermore, we agree quantum meruit relief is not supported by the evidence. "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made' [citations]." (*Huskinson & Brown v.*

Wolf (2004) 32 Cal.4th 453, 458.) But "there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation. [Citations.] [¶] Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly missing contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject. A quantum meruit analysis cannot supply 'missing' terms that are not missing. 'The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability . . . .' [Citations.]" (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419-1420.)

It is clear from the record both parties were aware the property needed some repairs before a lender would agree to finance a sale of it. Although the written purchase agreement contained clauses allowing plaintiff to inspect the property and either demand seller make repairs or cancel the agreement without penalty, the parties also entered into an oral agreement allowing plaintiff to take possession of the premises during escrow to "finish the rehab that was started . . . ." Prell's note to Henrichsen regarding the oral contract recognized that, if plaintiff failed to qualify for a loan to complete the purchase, seller would "get a house in a repaired condition."

Citing the documentation introduced at trial, the court found "sufficient evidence" existed "to apprise [it] . . . of the basis for the compensation requested by [p]laintiff . . . ." But "'the "mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." [Citation.]' [Citation.]" (*Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1315.) "'It must ordinarily appear that the benefits were conferred by *mistake, fraud, coercion or request*; otherwise, though there is enrichment, it is not unjust.' [Citation.]" (*Id.* at p. 1316, fn. omitted; accord 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1020, p.

1109.) Given the parties' oral agreement authorizing plaintiff to make the necessary repairs, the court erred in finding plaintiff was entitled to recover the reasonable value of the improvements he made to the property.

DISPOSITION

The portion of the judgment awarding $46,707.23 in damages to appellant Rick Pessler is reversed. The matter is remanded to the superior court with directions to modify the judgment to find in favor of defendants on the cause of action for fraud. As so modified, the judgment is affirmed. Appellant Greg Metcalf, as trustee of the Cynthia Court Trust #2331, and respondents Peggy Henrichsen and Cornerstone Properties, shall recover their costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.